Supreme Court, U.S.
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No. 94-775

In the Supreme Court of the United States

OCTOBER TERM, 1994

ESTATE OF FERDINAND E. MARCOS,
Petitioner,

v.

MAXIMO HILAO, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant review to determine whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1602-11, is relevant to a suit challenging actions taken by an official of a foreign government outside the scope of official responsibilities, when all the lower courts that have considered this question have concluded that it is not?

2. Should this Court grant review to determine the extraterritorial reach of the Alien Tort Claims Act, 28 U.S.C. § 1350, when this issue has become largely moot because of the passage of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat. 73 (1992), which clearly has extraterritorial application?

3. Should this Court address the power of a federal court to issue an in personam preliminary judgment preventing the transfer or dissipation of a defendant's assets pendente lite to protect a damage remedy when the courts have reserved this remedy for extraordinary cases?

4. Whether this case is an appropriate one to review when the preliminary injunction is likely to be vacated in favor of a permanent injunction in January 1995 and there is now pending in the Ninth Circuit another appeal from a modification to the preliminary injunction?

LIST OF PARTIES

This multi-district case consists of a class action for 10,059 individuals and several direct action cases for 23 individuals. The names of the representative plaintiffs and the direct action plaintiffs are as follows:

Celsa Hilao, Danilo de la Fuente, Renato Pineda, Adora De Vera, Domiciano Amparo, Rodolfo Benosa, Jose Duncan, Josefina Forcadilla, Arturo Revilla, Fluellen Ortigas, Ramon Veluz, Alfonso King, George Gaddi, Ramon Mappala, Emmanuel Umali, Ester Albano-Garcia, Jerrold Garcia, Crispin Aranda, Marcelino de Leon, Ramon Castaneda, Geraldo Socco, Manuel Buncio, Vicente Clemente, Jose E. Asuncion, Apolinario Madayag, Sr., Susan Araneta, Rex T. Brown, Don Facic, Eugenia Torres, Ramon Jalipa, Jose Maria Sison, Jaime S. Piopongco, Florentina Sison, Ramon Sison and Amalia Sison.

A list of the 10,059 class members is on file with the district court. The defendant is the Estate of Ferdinand E. Marcos, which is represented by Imelda Marcos and Ferdinand R. Marcos, Jr.

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STATEMENT OF THE CASE

This multi-district case includes a class action and several direct action cases brought by the victims of torture, extrajudicial murder, and forced disappearance against the Estate of Ferdinand Marcos. At least 10,059 individuals submitted claim forms providing detailed and specific information regarding their torture or the summary execution or disappearance of their loved ones. A jury in the U.S. District Court for the District of Hawaii found in September 1992 that Ferdinand Marcos was directly responsible for the harm suffered by plaintiffs and the class members, and also determined in February 1994 that $1.2 billion in exemplary damages should be awarded to the victims. The jury will reconvene once again on January 9, 1995 to determine the compensatory damages owed to the plaintiffs and class members. This case is the largest human rights case yet adjudicated in a United States federal court.

Issues related to those presented by Petitioner were included in a Petition for Certiorari filed in the related case of Marcos-Manotoc v. Trajano, No. 92-1559, cert. denied, 113 S.Ct. 2960 (1993).[1] There is presently pending before the Ninth Circuit an appeal from a modification to the preliminary injunction that is the subject of the Petition for Certiorari before this Court. Hilao v. Estate of Ferdinand Marcos, No. 94-16739 (filed Sept. 23, 1994)

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[1]Four other Petitions or Applications have been filed by a member of the Marcos family to this Court during the past seven years. Araneta et ux. v. United States, 479 U.S. 924 (1988); Ferdinand Marcos et ux. v. United States, 484 U.S. 890 (1987); Ferdinand and Imelda Marcos v. United States, 488 U.S. 952 (1988); Ferdinand and Imelda Marcos v. Republic of the Philippines, 490 U.S. 1035 (1989).

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner are not appropriate for review. The unanimous decision of the U.S. Court of Appeals for the Ninth Circuit is consistent in all its major tenets with the holdings of other federal courts on the issues related to the Foreign Sovereign Immunities Act (FSIA) and the Alien Tort Statute, 28 U.S.C. § 1350.[2] Any lingering questions about the applicability of the Alien Tort Statute have been cleared up by Congress's passage of the Torture Victim Protection Act of 1991, P.L. 102-256, 106 Stat. 73 (1992), which clearly has extraterritorial application. The Ninth Circuit's decision upholding the preliminary injunction is supported by the large majority of the circuits that have considered this question. Furthermore, this issue is likely to become moot when the preliminary injunction is converted into a permanent injunction at the trial scheduled in January 1995. See Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970).

I. No federal court that has addressed a case similar to the present one has reached a result inconsistent with any of the holdings of the Ninth Circuit regarding the applicability of the FSIA and the Alien Tort Statute. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984) (Edwards, J., concurring); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); In re Estate of Ferdinand Marcos--Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct. 2960 (1993); Von

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[2]The Ninth Circuit has also reviewed issues from this case on several earlier occasions: Trajano v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (unpublished); Hilao v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (unpublished); In re Estate of Ferdinand Marcos--Trajano v. Marcos-Manotoc, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct. 2960 (1993). The Ninth Circuit denied a requested writ of mandamus on September 26, 1991.

Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246 (D.D.C. 1985), reversed on other grounds, 736 F.Supp. 1 (D.D.C. 1990); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D.Cal 1988); and Abebe-Jiri v. Negewo, No. 90-2010 (N.D.Ga. Aug. 20, 1993) (awarding $500,000 in compensatory and punitive damages to each of three plaintiffs under 28 U.S.C. § 1350 for torture, cruel, inhuman and degrading treatment, and prolonged arbitrary detention committed by defendant while in Ethiopia). See also Linder v. Calero Portocarrero, 963 F.2d 332 (11th Cir. 1992) (recognizing a federal cause of action under diversity jurisdiction for acts of torture and summary execution). Moreover, the overwhelming majority of commentators on the subject have supported the result reached in these decisions.[3]

II. Petitioner's claim that the Ninth Circuit's decision is inconsistent with this Court's holding in Argentine Republic v. Amerada-Hess Shipping Corporation, 488 U.S. 428 (1989), is incorrect. Amerada-Hess involved a suit brought against a foreign government. This case is brought against an individual for actions taken in his individual capacity outside any possible scope of official activity.

Until this Petition for a Writ of Certiorari, Petitioner has never argued that the brutality orchestrated by Ferdinand Marcos was undertaken as part of his official duties. Indeed, Petitioner has consistently denied that Marcos even committed these acts.

Although the Ninth Circuit has ruled that the Foreign Sovereign Immunities Act (FSIA) does protect officers of foreign

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[3]See articles cited in David Cole, Jules Lobel & Harold Hogju Koh, Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos. 20 Hastings Int'l & Comp. L. Rev. 1, 23 n.78 (1988).

states in certain situations, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990), the Ninth Circuit has also consistently ruled that the FSIA:

> does not immunize a foreign official engaged in acts beyond the scope of his authority:
>
> > Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.

In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1470 (9th Cir. 1994)(quoting from Chuidian, supra, 912 F.2d at 1106). Petitioner has cited no cases that reach a contrary result.

If any doubt remained on this issue, it was certainly cleared up by the passage of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992), which expressly creates a cause of action against an individual who tortures or murders another person "under actual or apparent authority, or color of law, of any foreign nation" (Section 2(a)). In the event of any inconsistency between the TVPA and the FSIA, the TVPA would prevail as the later in time.[4]

III. Petitioner's claim that the Alien Tort Statute, 28 U.S.C. § 1350, should not be interpreted to have an extraterritorial effect is contrary to all decisions that have interpreted this statute.

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[4]See also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (Rehnquist, C.J.):

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

Petitioner cites Smith v. United States, 113 S.Ct. 1178, 1182 (1993), for the proposition that statutes are to interpreted to apply only within the United States unless a contrary intent appears. The Alien Tort Statute, however, clearly evinces such a contrary intent through its explicit reference to "an Alien," "the law of nations,' and "a treaty of the United States."[5] And courts, government officials, and commentators have understood it to apply extraterritorially since the early days of our nation's history. See, e.g. 1 Op. Atty' Gen. 57, 58 (1795) (the U.S. Attorney General stated that U.S. courts had jurisdiction under the Alien Tort Statute over a claim against an American slave trader who provoked an international incident by plundering the British colony of Sierra Leone in Africa: "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States"); Filartiga, supra (torture in Paraguay); Forti v. Suarez-Mason, supra (torture in Argentina); Abebe-Jiri, supra (torture in Ethiopia).

Even if Petitioner's proposed interpretation were somehow correct, it would be rendered moot by the passage of the TVPA, which evinces an unequivocal understanding that it is to be applied extraterritorially. Congress, in passing the TVPA, and President Bush in signing it, explicitly reaffirmed that the federal courts of the United States should be open to the claims of victims of torture and murder who have suffered at the hands of foreign government

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[5]See United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (extraterritorial application of statute may be inferred from nature of conduct proscribed). Certainly the first Congress intended the Alien Tort Statute to provide a cause of action against pirates operating outside the U.S. territorial sea who plundered foreign shipping, and this Court interpreted the criminal statute on piracy to apply to acts of piracy by one alien against another. United States v. Pirates, 18 U.S. (5 Wheat.) 184, 204-05 (1820); United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

officials, if they can obtain personal jurisdiction over these officials. The language of the TVPA and the legislative history supporting this statute leave no doubt that it was designed to clear up any doubt regarding the holdings of Filartiga, supra, (1) that torture committed "under actual or apparent authority, or color of law, of any foreign nation" is prohibited by the law of nations (see Section 2(a) of the TVPA), and (b) that the Alien Tort Statute provides both subject matter jurisdiction and a cause of action for a claim brought by one alien against another alien, even if the act occurs outside the United States. See The Torture Victim Protection Act of 1991: Report No. 102-249 of the Senate Judiciary Committee, 102d Cong., 1st Sess., at 3 (Nov. 26, 1991), Torture Victim Protection Act of 1991: Report No. 102-367 of the House Judiciary Committee, 102d Cong., 1st Sess., at 3-4 (Nov. 25, 1991); Torture Victim Protection Act of 19898: Report No. 101-55 of the House Judiciary Committee, 101st Cong., 1st Sess., at 2-3 (1969).[6]

IV. Requests to enjoin the use of a defendant's assets to preserve a damage remedy are rarely made. As a result, the availability of such relief has been reserved for extraordinary cases. The seeming difference among the circuits on this point, therefore, is more rhetorical than substantive in application, and does not warrant review by this Court.

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[6]In explaining why the TVPA was needed when the Alien Tort Statute was already in place, the Congressional reports state that the TVPA builds on the Alien Tort Statute "in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." Senate Rpt. No. 102-249, supra, at 5; House Rpt. No. 102-367, supra, at 4. It is hard to imagine a more explicit recognition that both the Alien Tort Statute and the TVPA were intended by Congress to apply "abroad," i.e., outside the territory of the United States.

As found by the Ninth Circuit, the instant case is certainly extraordinary. Id. 25 F.3d at 1480 The defendant is an unprobated Estate with assets of at least several hundred million dollars. The number of claimants alleging torture, summary execution or disappearance is in excess of 10,059. The verdict on damages was expected to, and did, exceed the Estate's known assets. The decedent, Ferdinand Marcos, and his spouse Imelda Marcos engaged in a variety of deceptive schemes in international finance over a 20 year period to secret their funds including un-numbered Swiss bank accounts controlled by Liechtenstein foundations. Two circuit courts in unrelated litigation upheld findings of their scheming and deceptive practices. Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988)(en banc). Moreover, the scheming to avoid payment of an ultimate judgment did not end with entry of the preliminary injunction. The District Court recently found that after issuance of the preliminary injunction the defendant Estate, through its legal representative Imelda Marcos, entered into two agreements to transfer and split the Estate's assets. (Tr. 9/12/94 at 59) Mrs. Marcos' refusal to consent to release of the Estate's Swiss bank records resulted in the entry of sanctions against the Estate. (Order, 9/3/93)

Petitioner's "scorecard" on the split of authority among the circuits at page 11 of its Petition is dramatically misleading. Petitioner asserts that four circuits (the First, Third, Fourth, and Ninth) allow injunctions pendente lite to freeze assets even if no equitable remedies are sought and four others (the Fifth, Sixth, Tenth, and Eleventh) do not. Upon closer inspection, however, it appears that all the circuits allow preliminary injunctions to prevent the dissipation of assets in extraordinary cases except the Fifth and Eleventh Circuits, and even the Fifth allows them in some situations. Petitioner ignores the decisions of the Seventh Circuit (Roland Machinery Co. v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984)), the Eighth Circuit (Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987)), and the District of Columbia

Circuit (Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985), all supporting the issuance of a preliminary injunction preventing dissipation of assets in extraordinary circumstances.

Petitioner's claim that the Sixth Circuit forbids such injunction is undercut by an examination of the case cited, USACO Coal Co. v. Carbonin Energy Co., Inc., 689 F.2d 94 (6th Cir. 1982), which holds in fact that the district judge did not abuse his discretion in issuing an injunction freezing defendant's assets. The Sixth Circuit stated that "[t]he power of the district court to preserve a fund or property which may be the subject of a final decree is well established." Id. at 97 (citing De Beers Consolidated Mines v. United States, 325 U.S. 212, 220 (1945), and Deckert v. Independence Shares Corp. 311 U.S. 282 (1940)). Similarly, the decision Petitioner cites from the Tenth Circuit, Home-Stake Production Co. v. Talon Petroleum, C.A., 907 F.2d 1012 (10th Cir. 1990), does not support Petitioner's position. That decision dismissed the claim because of a lack of personal jurisdiction, but went on to state that the trustee could seek an attachment with regard to the matter in dispute if he believes "that their assets are in danger of dissipation." Id. at 1021.

Finally, the rulings of the Fifth and Eleventh Circuits seemingly to the contrary came in civil RICO cases presenting no extraordinary facts. In Dixie Carriers, Inc. v. Channel Fueling Service, Inc. (In re Fredeman Litigation), 843 F.2d 821 (5th Cir. 1988) the Fifth Circuit disapproved of a preliminary injunction effectively placing an on-going business in receivership solely to protect a treble damage remedy in a commercial dispute. Unless read narrowly, Dixie Carriers is inconsistent with other decisions of the Fifth Circuit supporting the issuance of a preliminary injunction to protect a damage remedy in extraordinary circumstances. See Federal Savings & Loan Corp. v. Dixon, 835 F.2d 554, 560 n.1 (5th Cir. 1987), and Productos Carnic v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980). The Eleventh Circuit's ruling in Mitsubishi

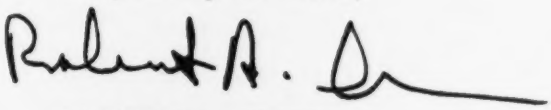
International v. Cardinal Textile Sales, 14 F.3d 1507, 1522 (11th Cir. 1994) simply follows Dixie Carriers in rejecting the use of a preliminary injunction to protect a treble damage remedy in a civil RICO case. In Mitsubishi plaintiffs case was a common commercial dispute cast as a RICO conspiracy, and the injunction placed several on-going businesses into receivership. Unlike the other Circuits, the panels in the Fifth and Eleventh Circuits read DeBeers broadly without analyzing this Court's decisions in Dechert v. Independence Shares Corp., 311 U.S. 282 (1940) and United States v. First National City Bank, 379 U.S. 378 (1965) which upheld preliminary injunctions protecting damage remedies.

The law appears to be clear, therefore, that in extraordinary circumstances a district court may by preliminary injunction prevent the dissipation of a defendant's assets pendente lite to protect a damage remedy.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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